

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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5 IN RE: FISHER-PRICE ROCK 'N) MDL No. 1:19-md-2903
6 PLAY SLEEPER MARKETING, SALES)
7 PRACTICES, AND PRODUCTS) This Document
8 LIABILITY LITIGATION,) Relates to ALL CASES
9)

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13 VIDEOTAPED DEPOSITION OF J. MICHAEL DENNIS, Ph.D.

14 Redwood City, California

15 Thursday, November 4, 2021

16 Volume I

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20 Reported by:

21 CATHERINE A. RYAN, RMR, CRR

22 CSR No. 8239

23 Job No. 4846748

24

25 PAGES 1 - 370

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12 Videotaped deposition of J.
13 MICHAEL DENNIS, Ph.D., Volume I, taken on behalf of
14 Defendant, at Goodwin Procter, LLP, 601 Marshall
15 Street, Redwood City, California, beginning at
16 9:06 a.m. and ending at 6:44 p.m., on Thursday,
17 November 4, 2021, before CATHERINE A. RYAN,
18 Certified Shorthand Reporter No. 8239.

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1 J. MICHAEL DENNIS, Ph.D., 09:07:11
2 having been administered an oath, was examined and
3 testified as follows:
4
5 THE VIDEOGRAPHER: Thank you. 09:07:12
6 You may proceed.
7
8 EXAMINATION
9 BY MR. KANNY:
10 Q Could you please state your full name for 09:07:13
11 the record and spell it too, please.
12 A My first name is John, J-o-h-n, middle
13 name Michael, M-i-c-h-a-e-l, and last name Dennis,
14 D, as in "David," e-n-n-i-s.
15 Q What is your date of birth? 09:07:29
16 A April 22nd, 1962.
17 Q Where do you currently reside?
18 A In East Palo Alto.
19 Q Could you provide your address for the
20 record, please? 09:07:39
21 A Yes. It is 2238 Lincoln Street --
22 "Lincoln" like our president -- East Palo Alto,
23 California.
24 Q Dr. Dennis, we met off the record. Let me
25 just introduce myself for the record. 09:07:54

1 entire side of the packaging that's depicted in
2 Mr. Kivetz's report?

3 A They would see the thumbnail. So the
4 thumbnail gets blown up to fill up the screen.

5 Q Right.

6 And if you look at page 10 of your report,
7 that would be thumbnail 2 -- page 10 of
8 Attachment B. I apologize.

9 A Yeah, I -- I trust you, Counsel. My -- I
10 have a mess in front of me --

11 Q That's fine.

12 A -- of paperwork.

13 Q I can represent to you that the thumbnail
14 that's thumbnail 2 that we were talking about is
15 just a blowup of that, and same with thumbnail 3.

16 So you didn't show them the complete
17 product packaging; you made a judgment call that you
18 didn't want to include that other picture and the
19 other advertising claim on the bottom of it?

20 A That's basically right. I thought the
21 user experience was going to get very cluttered with
22 all these thumbnails.

23 Q Okay. But --

24 A And the focus, of course, is on the front
25 packaging so that the front packaging panel was

16:24:32

16:24:42

16:24:58

16:25:06

16:25:21

16:25:30

1 shown to all the respondents, and they had the 16:25:34
2 opportunity to learn about the product that way,
3 and -- and they saw the key information on the back
4 panel. That's where a lot of the remaining real
5 estate is to be shown the respondents. I showed 16:25:49
6 them that.

7 And then after that, in terms of the
8 panels I left out, it was largely the same
9 messaging. It's the product name, about the Rock 'N
10 Play Sleeper. It's the Fisher-Price branding that's 16:26:02
11 being used again. So I made a tradeoff. I thought
12 I could have a better user experience not to have so
13 many images thrown at them.

14 Q Okay. I appreciate that explanation, but
15 I just want to get the facts right now. 16:26:19

16 The thumbnail 3, where is that on the
17 product packaging?

18 A You can see it on page 39 of Dr. Kivetz's
19 report. It's the upper center.

20 Q So it's the middle of the side of the 16:26:36
21 packaging?

22 A That's right.

23 Q Okay. And you chose to not show the
24 consumer the picture of the wake baby looking
25 directly at you playing with a toy sitting in the 16:26:52

1 Rock 'N Play; is that correct?

16:26:55

2 A Well, this is the control product we're
3 looking at here on page 39, but I show them the
4 sleeping baby on the front panel.

5 Q Yeah, I -- I -- I understand that, and
6 that's on page 8 where that's the front of the
7 product.

8 A (Witness nods head.)

9 Q What I'm asking you is: You chose only to
10 include the Fisher-Price in thumbnail 3 -- the
11 Fisher-Price logo, but not the photo that takes up a
12 third of the package of the baby awake, staring at
13 you, sitting in the Rock 'N Play Sleeper playing
14 with a toy?

15 MR. EVANS: Objection. Mischaracterizes
16 the document.

17 THE WITNESS: Counsel, why do you say "a
18 third of the package"?

19 BY MR. KANNY:

20 Q If you look at page 39, and on the top of
21 the photo that's depicted, there is the side of the
22 panel.

23 Would you agree with that?

24 MR. EVANS: Objection. Mischaracterizes
25 document.

16:27:44

1 THE WITNESS: Are you talking about the
2 upper left-hand corner?

16:28:04

3 MR. KANNY: No. I'm talking, right now,
4 of the entire top of the photo that depicts the
5 product package, and it looks like a piece that is
6 folded down. Then there's a picture of a baby.
7 Then there's a picture of the Fisher-Price logo and
8 then another photo of a mom awake, lying in bed,
9 watching the baby.

16:28:17

10 Q And you agree with me that the wake baby,
11 the logo, and the mother sitting awake, looking at
12 the baby, would be the top panel -- would be the
13 side of the --

16:28:34

14 A Okay. I'm following you --

15 Q -- package?

16:28:47

16 A -- now, Counsel.

17 Q Does that -- is that accurate, how I --

18 A It is. I mean, I don't think that's a
19 third.

20 Q Okay. Well, it's -- between the two
21 photos, it's more than half of the box.

16:28:52

22 MR. EVANS: Objection. Mischaracterizes
23 the document.

24 THE WITNESS: More than -- it's not more
25 than half of the box.

16:29:00

1 MR. KANNY: Strike that.

16:29:01

2 Q It's more than half of the side panel that
3 you did not show?

4 A So it's more than half of a third; is that
5 what you're saying? 16:29:08

6 Q No.

7 I'm saying, for the top -- so you
8 didn't -- you didn't -- you're -- you're only
9 showing four sides; you're not showing six sides.

10 You've chosen what you wanted to show, and 16:29:19
11 what I'm trying to say is that the pan- -- the
12 sides -- you showed one of the -- in thumbnail 2,
13 you showed part of the top and bottom, and you cut
14 out a photo and some additional advertising that was
15 contained there. 16:29:35

16 On this side -- the two sides of it you
17 didn't show, other than in the middle of the top
18 side that's depicted on page 39, is the Fisher-Price
19 logo. You decided -- and -- and on that top side of
20 the -- of the box is two photos. 16:29:53

21 Those two photos are, would you say, more
22 than half of that packaging?

23 MR. EVANS: Objection.

24 THE WITNESS: No.

25 MR. EVANS: Mischaracterizes the document. 16:30:04

1 BY MR. KANNY:

16:30:05

2 Q Half of the packaging of the side?

3 MR. EVANS: Same objection.

4 MR. KANNY: Counsel, this is hard enough
5 to explain without trying to interrupt here, so --

16:30:12

6 MR. EVANS: I'm not trying to interrupt.

7 BY MR. KANNY:

8 Q The -- I realize that the side is only
9 part of the box, but on the part of the box that is
10 the side, would you agree with me that the photos
11 make up more than 50 percent of the side panel?

16:30:26

12 A I -- actually, I -- I'm having a hard time
13 following you.

14 I mean, I'm looking -- I included the
15 entire front panel. So when you see -- and this is
16 very hard to do with us sitting, you know, so far
17 apart.

16:30:41

18 Q I'm not talking about the front panel.

19 A I understand, but the -- the way you're
20 talking, it sounds like you were.

16:30:50

21 So the front panel includes this picture
22 of the mother and the child and the inclined "all
23 night long" language. That's part of the front
24 panel.

25 Q Understood.

16:31:05

1 A You agree? 16:31:05
2 Q Yes.
3 A Okay. So I don't include the baby photo
4 that's on top of that.
5 Q That's the side panel; would you agree 16:31:09
6 with that? That gets folded down, and that becomes
7 the side panel.
8 A I guess it does.
9 I don't include that or the picture that's
10 immediately below the inclined "all night long." 16:31:19
11 Q Why did you take the -- why -- so let me
12 ask the first question.
13 A Mm-hmm.
14 Q Whether it's on the side or whether it's
15 on the face of the product packaging, why would you 16:31:33
16 take out a photo of a wake baby playing with a toy
17 staring directly at -- at you?
18 A I made a -- I made a judgment call.
19 Q What was the --
20 A I showed them -- 16:31:49
21 Q What was the basis --
22 A So --
23 Q -- of your judgment call to remove an
24 awake baby playing with a toy --
25 A Well, again -- 16:31:54

1 Q -- when you were doing your consumer -- 16:31:54
2 A -- I'm not showing -- I would never show
3 the control product. I don't know why you keep
4 saying that.

5 Q This -- this is -- this is the test 16:32:00
6 product.

7 A It is the test product?

8 Q Yes.

9 A Okay. Look, what I did here is a consumer
10 perception survey where the respondents needed to 16:32:08
11 look at the front panel. And I prioritized that
12 because that is the primary messaging from a
13 consumer experience. The front panels and -- you
14 know, there's literature on this. Front panels have
15 a disproportionate impact -- 16:32:34

16 Q You have never seen --

17 A -- on purchasing behavior.

18 Q -- a -- a product display for a Rock 'N
19 Play Sleeper that you can recall as you sit here?

20 A I don't have to. Every -- anybody that 16:32:45
21 does consumer market research knows the front of
22 panels of products make a disproportionate impact on
23 consumers.

24 Q Let me ask the question again.
25 You've never seen a product display for a 16:32:55

1 in someplace on it; you put it again in bold, in all 17:55:57
2 caps right up front for them, front and center, to
3 see, correct?

4 A I did. That's right.

5 Q And in the -- as we talked about earlier, 17:56:07
6 in trying to create the environment of how
7 somebody -- the purchasing environment of how
8 somebody -- you said surveys are supposed to try to
9 simulate.

10 Would a disclaimer ever be shown twice, in 17:56:19
11 all cap, bold, outside the context of the box and in
12 front and center so that everybody would see exactly
13 what you're wanting it to see -- what you're wanting
14 them to see in the manner that you've done it in the
15 real world? 17:56:36

16 MR. EVANS: Objection. Argumentative.

17 Misstates report. Misstates testimony.

18 THE WITNESS: From a survey perspective,
19 what I've done here is perfectly legitimate. I'm
20 providing additional information. This is a 17:56:47
21 hypothetical that's being put in front of the
22 respondent, and I'm giving them this scenario now
23 where there's additional information that led to
24 this disclosure, and then I'm asking them about
25 their purchase likelihood. 17:56:59

1 There -- there's nothing untoward or 17:57:01
2 irregular about providing this information. This is
3 an intervention in the way that I inserted this
4 disclosure into this survey process.

5 BY MR. KANNY: 17:57:15

6 Q Okay. Well, that's -- we can agree to
7 disagree on that too.

8 But you put product packaging on it. It's
9 one thing if the survey just had words, right? If
10 the survey just said: Okay. Here's a bunch of 17:57:26
11 product attributes, and now here's a disclaimer, and
12 the words of the disclaimer are separately, but you
13 actually included the product box for somebody to
14 look at so you can simulate what it's like in the
15 real world, but then you decided not to use a 17:57:40
16 disclosure on a box as if that would occur in the --
17 in the real world. Instead, you separated the text
18 out so that they had to see it in the manner you
19 wanted them to see it.

20 Would that be a fair understanding of how 17:57:53
21 this looks?

22 A Yeah. This is exactly the way I wanted it
23 to be.

24 Q Okay. You compare the Rock 'N Play to
25 cigarettes? 17:58:10

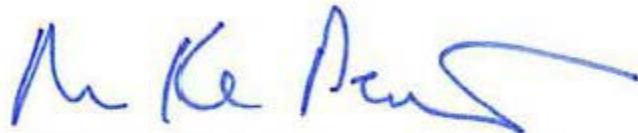
1 I, J. MICHAEL DENNIS, Ph.D., do hereby
2 declare under penalty of perjury that I have read
3 the foregoing transcript; that I have made any
4 corrections as appear noted, in ink, initialed by
5 me, or attached hereto; that my testimony as
6 contained herein, as corrected, is true and correct.

7 EXECUTED this 13th day of DECEMBER,

8 2021, at E. PALO ALTO, CALIFORNIA.

9 (City)

(State)

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14 J. MICHAEL DENNIS, Ph.D.

15 VOLUME I

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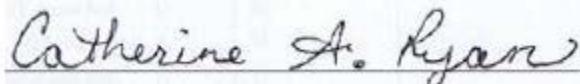
1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were administered an oath; that
8 a record of the proceedings was made by me using
9 machine shorthand which was thereafter transcribed
10 under my direction; that the foregoing is a true
11 record of the testimony given.

12 Further, that if the foregoing pertains to the
13 original transcript of a deposition in a Federal
14 Case, before completion of the proceedings, review
15 of the transcript [X] was [] was not requested.

16 I further certify that I am neither
17 financially interested in the action nor a relative
18 or employee of any attorney or any party to this
19 action.

20 IN WITNESS WHEREOF, I have this date
21 subscribed my name this 11th day of November, 2021.
22

23 

24 Catherine A. Ryan, RMR, CRR
25 CSR No. 8239

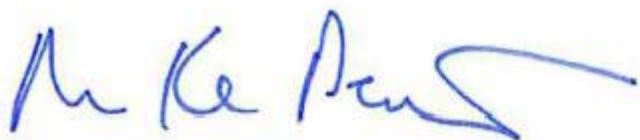
ERRATA SHEET

Re: Deposition of J. Michael Dennis, Ph.D., taken on November 4, 2021
Case: In re: Fisher-Price Rock 'N Play Sleeper Marketing

Page	Line	
55	17	Change: replace "prevalent" with "prevalence" Reason: Typo
144	4	Change: replace "approached" with "approach" Reason: Typo
184	23	Change: replace "mind me" with "my mind" Reason:
194	1	Change: replace "affect" with "effect" Reason: Typo
196	11	Change: replace "affected" with "effective" Reason: Typo
215	5	Change: replace "define" with "defy" Reason: Typo
215	6	Change: replace "defined" with "defied" Reason: Typo
218	6	Change: replace "designer" with "design" Reason: Typo
319	19	Change: replace "frontal" with "front" Reason: Typo
325	9	Change: replace "exclaimers" with "disclaimers" Reason: Typo

X Subject to the above changes, I certify that the transcript is true and correct.

 No changes have been made. I certify that the transcript is true and correct.



December 13, 2021